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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No. 902

MAURICE A. WHEELER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Maurice A. Wheeler, petitioner, by his attorneys Robert M. Taylor, Alexander Cooper and Melvin Schwartz, prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Third Circuit, entered March 2, 1960, affirming the judgment and commitment of the United States District Court for the Western District of Pennsylvania entered April 10, 1959, convicting him of violating Section 145(b) of the Internal Revenue Code, 26 U. S. C. A. 145(b).

Opinions Below

The opinion of the United States District Court for the Western District of Pennsylvania, entered March 20, 1957, is reported in 149 F. Supp. 445; and the opinion entered September 1, 1957, appears to be unreported. A copy of its opinion appears in the Appendix at page 38. A copy of Judge Miller's Memorandum Opinion dated August 17, 1955, appears in the Appendix at page 33.

The opinions of the United States Court of Appeals entered on June 24, 1958 and March 2, 1960 respectively appear in the Appendix on pages 46 and 65.

Jurisdiction

The jurisdiction of this Court is involved under Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A. Section 1254(1). The order and judgment of the Court of Appeals for the Third Circuit was entered on March 2, 1960. A copy of its judgment appears in the Appendix at page 71.

Questions Presented

1. Whether a Judge of co-ordinate jurisdiction sitting in the same Court, may overrule the decision of an associate Judge, regarding a motion to suppress evidence where said Judge hears testimony from the defendant and additional witnesses not presented before his associate?

2. May a trial Judge restrict the defense from presenting to the jury evidence of fraud and deceit practiced on the defendant by Government agents and refuse to charge on said question when two other Judges reached opposite conclusions concerning fraud and deceit?

3. Does a Court of Appeals have jurisdiction to review an interlocutory order (motion to suppress) because the hearing Judge quashes an indictment to afford the Government an opportunity to appeal?

4. May the Court of Appeals, while reviewing the propriety of the dismissal of an indictment, take jurisdiction and consider the action of the District Court in granting a motion to suppress evidence?

Statutes and Federal Rules of Criminal Procedure Involved

Statute: June 25, 1948, c. 646, 62 stat. 928, 28 U. S. C. A. 1254(1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *".

Statute: 18 U. S. C. § 3731 (1952):

> "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

56 Stat. 271 (1942), 18 U. S. C. § 682 (1946):

> "An appeal may be taken by and on behalf of the United States from the District Courts to a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:
> "From a decision or judgment quashing, setting

aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act."

Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Federal Rule of Criminal Procedure 12 (b) (2):

"The motion raising defenses and objections. Defenses and objections which must be raised.

"Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the Court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitute a waiver thereof, but the Court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the Court at any time during the pendency of the proceeding."

Federal Rule of Criminal Procedure 41 (e):

"Motion for Return of Property and to Suppress Evidence. A person, aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing."

Federal Rule of Criminal Procedure 29 (a):

> "Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses, charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

Statement of the Case

Petitioner appealed from the judgment and commitment of the United States District Court for the Western District of Pennsylvania entered on April 10, 1959, convicting him of violating Section 145(b) of the Internal Revenue Code, 26 U. S. C. A. 145(b) was taken to the Court of Appeals for the Third Circuit.

Under the indictment filed September 9, 1954, the defendant was charged with willfully and knowingly attempting to defeat and evade part of the income taxes due and owing by him for the calendar year 1950 by filing and causing to be filed a false and fraudulent income tax return for year 1950, wherein he knowingly understated his net income and taxes due thereon for year 1950. The amount of income taxes alleged to have been evaded is $1470.16. He was arraigned on September 30, 1954, and pleaded not guilty.

On October 18, 1954, defendant filed motions for a Bill of Particulars, To Suppress the Evidence and To Dismiss the Indictment.

On December 9th and 10th, 1954, a hearing on the said "Motion to Suppress Evidence" was held before the Honorable John L. Miller, Judge, in which there were called as witnesses Byron Krieger, Robert W. Corey and Robert J.

Madden. The defendant did not testify before Judge Miller for the reason that he claimed the protection of the Fifth Amendment.

On the basis of the testimony presented at said hearing, Judge Miller filed an opinion and order on August 17, 1955, stating in said order that the defendant's motion to suppress the evidence and dismiss the indictment and motion for return of books and records were denied without prejudice to defendant's right to object to the admission of evidence; and in said opinion, "* * * after consideration of the facts above set forth, in light of the foregoing authorities, the Court is of the opinion that the defendant's motions should be denied, without prejudice to defendant's right to object to the admission of evidence obtained from his records. Cf. Smith v. U. S., 348 U. S. 147, 150-151 (1954). An appropriate order is entered."

On November 15, 1955, defendant filed a petition for reargument and reconsideration of his Motion to Suppress Evidence. After hearing by Judge Miller on December 12, 1955, said petition was dismissed on May 1, 1956. In the memorandum opinion and order dismissing the said petition, Judge Miller stated "* * * Defendant earnestly contends that the facts are not in dispute and that, therefore, a final ruling upon defendant's objection to the admissibility of the evidence in question should be made prior to the trial. However, by the weight of authority, the facts which have thus far been adduced are insufficient to sustain defendant's objections as a matter of law. See, in addition to cases cited in this Court's prior opinion, *Scanlon v. United States*, 223 F. 2d 382 (1st Cir. 1955). The Court's refusal to make such final ruling prior to trial is therefore not prejudicial to defendant."

On June 9, 1956, a praecipe for appearance of defendant's new counsel (present counsel) was filed. On September 20, 1956, a petition by defendant's previous counsel and an order of Court were filed respectively requesting and granting previous counsel leave to withdraw from the case.

On August 27, 1956, defendant filed a petition for rehearing on his Motion For The Suppression of Evidence (see Appendix, page 39).

On November 26, 1956 and January 4, 1957, a hearing on said Motion to suppress evidence was held before Chief Judge Wallace S. Gourley, in which there were called as witnesses, the defendant, Maurice A. Wheeler, Ross Thompson, Andrew L. Hankowski, Gilbert Robertson, George H. LeMay and Byron Kreiger, all being Government agents.

It is to be noted that the defendant and the other witnesses, except Byron Kreiger, did not previously testify before Judge Miller.

At the time of the hearing on November 26, 1956, it was stipulated that all of the testimony presented at the hearing before Judge Miller on December 9th and 10th, 1954, would be incorporated as part of the record of the proceeding to be formulated before Chief Judge Gourley in disposing of the petition for rehearing.

Judge Miller, however, for a short time, did sit with Chief Judge Gourley during part of this hearing.

On February 21, 1957, an order was entered directing this matter to be assigned to Chief Judge Gourley *nunc pro tunc* as of September 21, 1956, by Judge Miller with consent thereon of Chief Judge Gourley.

On March 20, 1957, the District Court by Chief Judge Gourley, entered an order granting the motion of the defendant to suppress the evidence (149 F. Supp. 445).

An appeal was taken by the Government to the United States Court of Appeals for the Third Circuit on April 5, 1957, under No. 12,257.

On June 6, 1957, an order was entered by the said Court of Appeals extending the time for filing the appellant's Brief and Appendix to August 13, 1957. This order was based upon appellant's reason that it was awaiting the decision of the Supreme Court of the United States in the *Carroll* case (354 U. S. 394, 1 L. Ed. 2nd 1442, 77 S. Ct. 1332) which was decided on June 24, 1957.

On August 1, 1957, based on an agreement of the parties, the said Court of Appeals dismissed the appeal.

On September 3, 1957, the Government filed a petition and motion for Rehearing and Reconsideration based on alleged inconsistencies on the part of Chief Judge Gourley in overruling Judge Miller, his associate Judge, on substantially the same set of facts and circumstances; and that the conclusion reached by Chief Judge Gourley was contrary to a decision of the above said Court of Appeals in the case of *United States v. Joseph Frank*, Appeal No. 12,168, filed May 15, 1957 (*United States v. Joseph Frank*, 245 F. 2nd 284).

The Government's petition also adverted to Chief Judge Gourley's opinion filed on June 26, 1957, in the case of *In Re Terzich's Petition* (153 F. Supp. 651), in which he stated that in a multiple Court each member of the Court should follow the rulings of an associate member where the same set of facts and the same questions of law arise.

Chief Judge Gourley found, after said hearing, that the same facts and circumstances were not presented to Judge Miller as were reported to him.

The Government also contended that the *Frank* case governed and controlled the disposition of the Wheeler case as to the requestion suppression of the evidence; that the evidence in the Wheeler case was "on all fours" with the *Frank* case. Chief Judge Gourley found that the *Frank* case did not control the Wheeler case and distinguished them by finding that in the *Frank* case the agents testified that the investigation made of Frank's tax returns was routine but they denied that they ever told Frank they were merely conducting an investigation to determine routine civil tax liability, whereas in the Wheeler case the investigating agent was told by his superior that he was to express to the defendant, Wheeler, that he was making a routine tax investigation and that said statement was made as a pretext to accomplish the underlying purpose of the investigation to wit, to determine if Wheeler was implicated in criminal liability with any employees of the Internal Revenue Service, that said investigation was made with the primary purpose of rendering Wheeler and any person with whom he might have been associated directly or indirectly in the Internal Revenue Service as a possible subject for criminal prosecution.

Although the defendant's new Counsel had not pressed the defendant's motion to dismiss the indictment Chief Judge Gourley, on September 6, 1957, acted upon it. On said date he filed an opinion and order refusing the Government's motion for reconsideration of the Court's order dated March 20, 1957, and in addition thereto dismissed the indictment.

The Government filed its notice of appeal on September 30, 1957, which was docketed under number 12,483.

On February 27, 1958, defendant filed a motion to dismiss the said appeal for lack of jurisdiction. After hearing the

Court ordered that said motion to dismiss the appeal would be considered by the Court when hearing Argument on the appeal.

Said appeal and motion to dismiss were heard and argued on April 18, 1958.

On June 24, 1958, the Court filed its opinion (256 F. 2nd 745) denying defendant's motion to dismiss the appeal and vacating the District Court order of March 20, 1957 granting the defendant's Motion to suppress evidence; vacating the District Court order of September 6, 1957 granting Motion to dismiss; and remanding the cause for further proceedings consistent with that opinion.

In said opinion the Appellate Court recognizes Judge Miller's denial of defendant's Motion to suppress evidence and for dismissal of the indictment, without prejudice, however, to defendant's right to object to the admission of the evidence at trial.

On January 26, 1959, defendant's trial began before the Honorable Judge Rabe Marsh and continued until January 30, 1959, when after hearing the evidence as restricted by the Trial Judge, it returned a verdict of guilty.

Defendant's counsel, immediately before the trial, renewed the motions for suppression of the evidence and objected to the admissibility of the Government's evidence as it was introduced and presented to the Court and jury during the trial on the grounds of fraud, deceit and misrepresentation as practiced by the Government's agents in obtaining the defendant's books and records from him and the Government's violations of his constitutional rights, under the Fourth, Fifth Amendments to the Constitution of the United States, which objections were overruled. The

defendant was not permitted to testify as to such actions and constitutional violations, the Trial Judge ruling that the opinion and order of Judge Miller was the law of the case and binding upon the Trial Court.

Defendant's counsel renewed said motions after the defense rested and after the trial had ended.

On February 3, 1959, defendant filed a Motion for a New Trial for the reasons that (1) the verdict was contrary to the weight of the evidence produced during the trial, (2) the verdict was not supported by substantive and probative evidence, (3) the Court erred in refusing the defendant the right to introduce evidence which would prove that the Government obtained the defendant's books and records by fraud, trickery and deceit, (4) the Court erred in refusing to charge the Jury on the question of the Government's obtaining the defendant's books and records by fraud, trickery and deceit, and (5) the Court erred in failing to suppress the evidence upon which the Government built its case against the defendant, for the reason that such evidence was obtained by fraud, trickery and deceit.

The Trial Court denied, after hearing, the defendant's motion for a new trial and on April 10, 1959, filed its Judgment and Commitment from which an appeal was taken.

The case was argued before the United States Court of Appeals for the Third Circuit on November 24, 1959 and an opinion affirming the District Court was filed 4 months later on March 2, 1960.

ARGUMENT

Reasons for Granting the Writ

I. It is the contention of the petitioner that the evidence and information the Government's agents obtained from him, directly and indirectly, when he turned over to them his books and records, as well as any of his oral admissions made to them during the investigative period should not have been allowed in evidence by the Trial Judge as requested in his petition and Motion to Suppress the Evidence.

This contention is based upon two separate yet interrelated grounds. One is the constitutional guarantee in the Fourth Amendment to the Constitution of the United States against unlawful searches and seizures, and the second is the privilege against self-incrimination contained in the Fifth Amendment.

The Supreme Court, in *Boyd v. United States*, 116 U. S. 616, states *inter alia*:

> "* * * We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that a seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms * * *".

> "* * * and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, within the meaning of the Fourth and Fifth Amendments * * *".

Petitioner submits that the testimony at the pre-trial hearing of agents Thompson, Hankowski and Robertson, as well as that of Agent Krieger, definitely shows that they were engaged and knew they were engaged in a criminal investigation from its inception; and that it also encompassed the defendant. Further, that the underlying purpose in investigating petitioner's tax returns was to find evidence of criminal wrongdoing on the part of Internal Revenue employees and whether the petitioner was implicated in such criminal wrongdoing, that he was included as a possible subject for criminal prosecution. That the representations of a routine tax investigation was but a pretext to accomplish the underlying purpose.

Krieger testified that he proceeded to examine petitioner's income tax returns and books without disclosing his special instructions which examinations did not disclose any criminal connection with said personnel but gave evidence of a possible tax evasion.

Ross Thompson testified he told Krieger to conduct a routine tax investigation of defendant with the additional mission of ascertaining involvement of Internal Revenue employees and petitioner in any wrongdoing with a view to obtaining facts which would lead to criminal prosecution. That no suspicion of criminal evasion of income tax violation on the part of petitioner existed at the time the investigation was begun, but that the alleged routine inves-

tigation to determine Civil liability was conducted with the view to ferreting out acts of wrongdoing on the part of the Internal Revenue employees with any other person. That the underlying purpose in investigating petitioner's tax returns was to find evidence of criminal wrongdoing on the part of Internal Revenue employees and whether petitioner was implicated in such wrongdoing. That if petitioner was implicated in such criminal wrongdoing, that he was to be included as a possible subject for criminal prosecution. That the representations of a routine tax investigation was but a pretext to accomplish the underlying purpose.

Petitioner contends that the testimony and admission of the Government's investigation is overwhelming evidence that they certainly committed a fraud and deceit upon him in violation of his said constitutional rights in procuring his books and records from him. That they were not voluntarily turned over to them by him; nor did he consent to their use against himself.

Petitioner further contends that he was deluded into turning over to the Government's agents his books and records for examination and that his action in so doing was not and cannot be said to be voluntary. That the facts in this case are controlled by the law as expressed by the Supreme Court in the case of *Gouled v. United States*, 255 U. S. 298, at page 305, 41 S. Ct. 261, at page 263, 65 L. Ed. 647, wherein it is stated,

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable, and therefore a prohibited search and seizure, as it cer-

tainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

"Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment. * * *"

Also in *United States v. Guerrina*, 112 F. Supp. 126, 128-129, wherein Judge Clary states,

"* * * I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes."

And as Chief Judge Gourley found in the instant case (149 F. Supp. 445),

"* * * Upon a most reflected view of the decisions, it is apparent that the law distinguishes between failure on the part of a Government investigator to disclose the purpose of his investigation at its inception when suspicion of criminal wrongdoing exists and the discovery of criminal wrongdoing in the course of a routine investigation. To secure evidentiary matter without making such disclosures when criminal wrongdoing is suspected constitutes a fraud and deceit upon the taxpayer in violation of his constitutional rights and his

right against self-incrimination. U. S. C. A. Constitution Amends. 4, 5; United States v. Lipshitz, 132 F. Supp. 519.

"I am satisfied that the testimony of the special investigators sufficiently establishes that a fraud and deceit was perpetrated upon the defendant at the inception of the investigation in order to secure evidentiary material with the intent to use the same against him. The fact that the criminal investigation was directed at determining criminal wrongdoing in league with personnel of the Internal Revenue Service and ultimately developed evidence which became a subject of criminal prosecution for income tax violation, does not vitiate from the initial trickery and artifice. * * *"

The Court of Appeals in its opinion filed June 24, 1958 (256 F. 2d 745), states, *inter alia*,

"It is true that some different witnesses testified before Judge Gourley than were heard by Judge Miller, but from an attentive perusal of the transcripts we fail to perceive that the substance of their testimony bearing on the motions to suppress the evidence and dismiss the indictment was any different. * * *"

Attention is called to the fact that Judge Miller, when writing his opinion had no knowledge that Ross Thompson had directed Agent Krieger to advise Wheeler he was making just a routine investigation as a pretext to obtain information for their criminal investigation of Internal Revenue personnel and Wheeler. This was certainly new evidence as was Hankowski's testimony as to the criminal aspects of the investigation. Their testimony gives an overall picture and description of the investigation that Judge Miller did not apparently have. As he also states in said opinion,

"as the authorities cited below indicates, no immunity is inferred by the failure of an Internal Revenue agent, in making a routine examination, to advise a taxpayer of his constitutional rights or to advise of what should

be obvious, *i.e.*, that appropriate action will be taken if evidence of a crime is disclosed. The foregoing is especially sound as applied to the instant case, the taxpayer in question being an experienced attorney. On the other hand, the constitutional protection against unlawful searches and seizures extends to evidence obtained through fraud and deceit as well as to that obtained through the unlawful use of force. Gouled v. United States, 255 U. S. 298, 305-06 (1921).

"In the instant case there has been no evidence of affirmative or fraudulent misrepresentations. On the other hand, although Krieger's procedure in examining defendant's return was routine, the fact that Kreiger, from the Detroit office, was making the examination, as part of the investigation growing out of alleged irregularities in the Pittsburgh Internal Revenue office, was certainly not routine * * * citations."

The Revenue agent's examination was here employed as an instrument of criminal law enforcement to circumvent legal restrictions, rather than a *bona-fide* preliminary step in a routine tax examination. U. S. v. Abel, ...

It is argued by defendant that if Judge Miller had heard the testimony of Thompson and Hankowski and further testimony of Krieger, he would have found evidence of affirmative and fraudulent misrepresentation by the Government agents.

Nevertheless, petitioner contends that when he renewed his motion to suppress the evidence before the Trial Judge at the beginning of the trial of the defendant, such motion should have been sustained and allowed upon all the overwhelming evidence adduced at the prior hearings, That the Trial Judge erred in not granting said motion and holding that Judge Miller's ruling was the law of the case, and not giving any consideration to Chief Judge Gourley's findings and the testimony taken before him (38a).

Petitioner again contends his motion to suppress evidence was properly made under Federal Rule of Criminal Procedure 41 (e) and should have been allowed under the law as stated in the foregoing cases. That the obtaining of petitioner's records and books by deceit and misrepresentation was an unlawful seizure of same. See *U. S. v. Wolrich*, 119 F. Supp. 538, 129 F. Supp. 528.

In holding that Judges of co-ordinate jurisdiction sitting in the same Court and in the same case should not overrule the decisions of each other, and stating further in its instant decision, that the Third Circuit Court takes issue with the Second Circuit Court and will not follow the opinion in the case of *Dictograph Products Company vs. Sonotone Corporation*, 230 F. 2d 131, this Court of Appeals has created a clear conflict of basic Federal Law which has not been, but should be, settled by the Supreme Court.

The instant decision clearly states that it does not agree with the opinion of the Second Circuit, in the case of *Dictograph Products Co. (supra)* and rather, will follow its own thinking as set forth in the case of *T. C. F. Film Corporation vs. Gourley*, 240 F. 2d 711.

It appears that in the instant case, the sharp line of difference between the cases lies in the fact of "availability of the original Judge to hear the motion for reconsideration." The Third Circuit sets forth a rule that should the original Judge be available, then practically speaking, another Judge cannot hear the motion for reconsideration; otherwise there would be an abuse of discretion. This line of reasoning, we fail to follow, rather we hold with the logic of the reasoning of the Second Circuit in the *Dictograph* case (*supra*) to the effect that, primarily, we are interested in rights and wrongs and speedy justice. We contend that

to follow the reasoning of the Third Circuit, as in this case, would be tantamount to prohibiting a Judge from reconsidering his own decision, even though additional evidence is presented to him.

This thinking sets up a system of making a litigant go through the ordeals of an unnecessary trial and expense. We argue that a situation such as this must be clarified, and a ruling made by the Supreme Court.

The record discloses that although Judge Miller denied the firsf motion for suppression of the evidence and for dismissal of the indictment without prejudice, the defendant's new counsel filed another petition for rehearing of the motion to suppress evidence only and did not press reconsideration of the question of dismissal of the indictment. Further the record discloses that defendant's new petition for rehearing was heard in the beginning by both Judge Miller and Judge Gourley and Judge Miller finding that he was to be tied up in lengthy litigation permitted Judge Gourley to sit in his place and to act for him, with his consent, and in order to create no administrative mix-up, signed a *nunc pro tunc* order. Nowhere in the record is there anything to show that Judge Gourley did not consult and hold counsel with Judge Miller before rendering his final opinion. In effect Judge Gourley did not create an abuse of his discretion, for the record shows that this petition was heard originally by Judge Gourley and Judge Miller and he had Judge Gourley continue to sit, as it were, in his place, with his full consent to reconsider in the same manner as if he, Judge Miller, was sitting alone.

These recorded facts are contrary to the appellate opinion which clearly bases its thinking on a set of facts where there are two entirely separate judges in the same District

Court who have not consulted with each other and who have acted independently of each other. In the cases discussed at great length by the Appellate Court each judge of the District Court involved was making an independent decision without any consultation or discussion or without affording the opportunity to the other judge to sit with him or act for him as in this case, concerning the petition for reconsideration.

To permit any different application of logic for a distinction between the present case and the ones discussed in the appellate opinion would result in a substitution of thinking on the part of the appellate for the judges involved in the District Court, as to facts alone.

The record further clearly discloses that the facts of the present case do not for one moment give rise to an interpretation which can result in one District Court Judge overruling another Associate Judge's opinion of the same District Court on the identical facts, because the new Counsel's petition for rehearing was considered by both judges and merely continued to a conclusion by one with the full consent of the other.

It is not a new or novel situation for a judge to change his line of thinking from an original opinion and on reconsideration rule contrary to his original opinion. This we urge is what actually took place concerning Judge Miller and Judge Gourley for to say otherwise would run contrary to the facts of the record. *Dictograph Products Company v. Sonotone Corporation*, 230 F. 2d 131. "From page 134 (1, 2)"; no one will suggest that the first Judge himself may not change his mind and overrule his own order, so that the basis of the doctrine can only be that there are reasons why the second Judge may not do so that do not exist when the first does."

II. It is petitioner's contention that the Trial Court should have entertained his motion to suppress the evidence and sustained it. Having denied his motion to suppress the evidence at the beginning of the trial, the Judge should have permitted petitioner to present his own witnesses and elicit from them evidence as to such actions of fraud and deceit; and further to have permitted petitioner himself to testify as to the involuntariness of his delivery of his books and records to the agents and his constitutional lack of consent to the use of same, all in violation of his constitutional rights under the Fourth, Fifth and Sixth Amendments.

This contention of defendant is based upon the law as expressed by the Supreme Court of the United States in the case of *Gouled v. United States*, 255 U. S. 298, as defendant's books and records were obtained from him by deceit and fraud, such taking being an unlawful search and seizure in violation of the Fourth Amendment, and their use for trial and other evidence obtained through their use is the same as compelling him to be a witness against himself and a violation of the Fifth Amendment.

This Court states in *Gouled v. United States*, 255 U. S. 298, 312, 313,

> "The papers being of 'evidential value only' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the Trial Court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial Court acted upon the rule, widely adopted, that Courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of pro-

cedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial Court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the questions as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

"In the case we are considering, the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied; and that, on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have been apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the Court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

Amos v. U. S., 255 U. S. 314, 315; *U. S. v. Guerrina*, 112 F. Supp. 126; *Silverthorne v. U. S.*, 251 U. S. 392; *Weeks v. U. S.*, 232 U. S. 394, 395; *Boyd v. U. S.*, 116 U. S. 616; *Fraternal Order of Eagles No. 778 v. United States*, 57 F. 2nd 93, 94; *Takahashi v. United States*, 143 F. 2d 124, 125; *Wilson v. U. S.*, 162 U. S. 613, 623.

It was certainly apparent in the record of this case that there were, at the least, possible violations of the Fourth and Fifth Amendments, which should have caused the Trial Judge to look more thoroughly into the evidence already elicited at the prior hearings and argued upon by petitioner's counsel, and to decide for himself as to the

admissibility of the evidence and whether or not it should have been presented to the jury to consider the weight of such evidence. He should have given great weight to Chief Judge Gourley's findings and Order of Suppression.

Even beyond the consideration by the Trial Judge, himself as to the admissibility of such evidence he should have allowed its introduction into the trial for weighing and consideration by the Jury based upon the prior orders and opinions of Judge Miller in which he directed:

> "Defendant's motion to suppress evidence and to dismiss indictment and motion for return of books and records are denied without prejudice to defendant's right to object to the admission of evidence" (9a); "The Court's refusal to make such final ruling prior to trial is, therefore, not prejudicial to defendant" (10a); "And now, to wit, this 29th day of December, 1955, It is Ordered that defendant's motion to suppress evidence and for the return of property be, and the same is hereby denied, and defendant's petition in support of such motion is refused; without prejudice, however, to defendant's right to object to the admission of such evidence upon trial of this action" (10a).

> "Further, this Court of Appeals recognizes these directions in its opinion of June 24, 1959, wherein it states *inter alia*, * * * on these facts Judge Miller on August 17, 1955, denied the motion for suppression of the evidence and for dismissal of the indictment, without prejudice to defendant's right to object to the admission of the evidence at trial. * * *."

Also, Judge Miller indicates this in his said opinion when he refers to *Gouled v. United States* and cf. *Smith v. U. S.* 348 U. S. 147, 150-151 (1954), pinpointing on pages 150 and 151 of said decision that the trial judge submitted the issue to the jury with the instruction that they were to reject the statement, and all evidence obtained through it, if trickery, fraud or deceit were practiced on petitioner or his

accountant. Most certainly, Judge Miller must have intended the trial judge to present the facts of fraud and deceit and voluntary consent to have been weighed and considered by the Jury at trial. It is to be noted that the Supreme Court in the *Smith* decision said that the issue of fraud and deceit on the part of the Government agent was properly submitted to the jury. *Scanlon v. United States*, 223 F. 2nd 382, 384, 392.

In *Guerrina v. U. S.*, 126 F. Supp. 610, the Court states, *inter alia*,

> "* * * the question as to whether the defendant consented to the examination of his check stubs and other records which he himself made available to the agents, without first being warned of his constitutional rights, is one that cannot be determined preliminarily as a matter of law but is one which must be determined as a question of fact by the jury at the time of trial."
>
> "* * * The circumstances of the investigation and the failure to warn the defendant of his rights were matters which went only to the weight and credibility of the evidence thus obtained and not to its admissibility."

In *Biggs v. United States*, 246 F. 2nd 44, the Court states *inter alia*,

> "* * * Whether the books were voluntarily surrendered by the appellant or were obtained under a promise of immunity or through fraud or misrepresentation on the part of the Government is a question of fact. * * *"

Petitioner submits that such wording of Judge Miller in his opinions and orders could only mean during the trial and not before trial.

This is indicated by Judge Miller's actions in the case of *United States v. Joseph Frank*, 151 F. Supp. 865, 866, January 4, 1956, which was a petition and motion to sup-

press evidence and for the return of property under Rule 41 (e). Judge Miller denied the motion, stating:

> "* * * For the foregoing reasons defendant's motion has been denied, without prejudice, however, to his right to object to the admission of the evidence in question at the trial of the action."

In *United States v. Frank*, 151 F. Supp. 866, December 4, 1956, which was the trial on the merits, Judge Miller permitted the question of voluntariness, and of fraud, deceit and misrepresentation by the Government agents, to be raised in the trial and charged, *inter alia*,

> "* * * any such evidence, including papers, business books, records, bank records, and cancelled checks, as well as oral and written admissions obtained from the defendant by fraud, force, persuasion, misrepresentation, trickery or deceit of the Government agents, if any, should not be considered against this defendant."

It is to be noted at the trial of the instant case, the Trial Judge refused petitioner's request for charge (66a) as to the voluntariness of Wheeler's turning over his books and records to the Government agents and the practice by them of fraud, deceit and misrepresentation. See *Smith v. United States*, 210 F. 2nd 498.

The issue of admissibility is purely one of law and can and should be first determined by the Trial Judge, but the weight of evidence and the test of credibility, belief or disbelief, of the statements or facts surrounding the evidence, is one for the jury alone. Anything that is factual or subject of belief or disbelief in a criminal trial must be submitted to the jury, who alone are the triers of the facts. In this case, defendant submits the Trial Judge should have submitted the question of fraud and deceit practiced on Wheeler by the Government agents to the jury and all evidence obtained through it. Pre-trial motions in criminal

cases, never settle conclusively the factual situation, particularly facts that are subject of belief or disbelief. If this were not true a defendant would be denied his constitutional rights to a trial by jury. Pre-trial motions are only procedures set up to prevent unnecessary hardship or going through a complete trial, when and if the evidence clearly shows a lack of reaching the heights necessary under the law for prosecution in the first instance. However, never for one moment was it contemplated that the results of a pre-trial motion would be conclusive as to a factual situation, calling for belief or disbelief, so as to remove same from the jury's sole prerogative of determining the truthfulness of the facts and evidence obtained from them.

In *Hanson v. United States*, 186 F. 2nd 61, 64-66, and in *Montgomery v. United States*, 203 F. 2nd 887, 893, as well as in many of the other cases cited by Judge Miller where there were pre-trial hearings on motions to suppress evidence which were denied, the same evidence produced at such hearings was allowed in the trials of the cases.

The petitioner is entitled to the protection afforded him by the Fifth Amendment. If the books and records were delivered by him to the Government agents involuntarily, such as by fraud, deceit, force or intimidation, they cannot be used as evidence against him. *In re: Fried*, 161 F. 2nd 453; *U. S. v. Wolrich*, 129 F. Supp. 528; *U. S. v. Profaci*, 124 F. Supp. 143; *Eastus v. Bradshaw*, 94 F. 2d 789, 790; *Benes v. Canary*, 224 F. 2d 470; *Centracchio v. Garrity*, 198 F. 2nd 382; *U. S. v. Asendio*, 171 F. 2d 122; *Jennings v. U. S.*, 19 F. R. D.; and 247 F. 2d 784.

> "* * * The trial judge, Judge Holtzhoff, had not been informed that the pre-trial denial of the motion had been without prejudice. * * *"

Black's Law Dictionary, Fourth Edition, defines "without prejudice" as

> "Where an offer or admission is made 'without prejudice' or a motion is denied or a suit dismissed 'without prejudice' it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided."

See *Genet v. Delaware & H. Canal Co.*, 170 N. Y. 278, 63 N. E. 350; *O'Keefe v. Irvington Real Estate Co.*, 87 M. D. 196, 39 Atl. 428; *Olson v. Coalfield School District, No. 16, of Divide County*, 54 N. D. 657, 210 N. W. 180, 181.

A dismissal without prejudice "allows a new suit to be brought on the same cause of action". *Friedenbloom v. McAfee*, Tex. Civ. Aff., 167 S. W. 28; *McIntyre v. McIntyre*, 205 Mich. 496, 171 N. W. 393, 394.

Law Dictionary—Ballentine Second Edition, defines "without prejudice" as

> "The term imports that no right or remedy of the party is affected. The use of the phrase simply shows that there has been no decision of the case upon the merits, and prevents the defendant from setting up the defense of *res adjudicata*."

See *Olson v. Coalfield School District*, 54 N. D. 657, 661, 210 N. W. Rep. 180, 181.

Black defines "trial" as

> "* * * in its strict definition the word 'trial' in criminal procedure means the proceedings in open Court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict."

Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488-9, 54 A. L. R. 1220.

It includes all proceedings from time when issue is joined or, more usually, when parties are called to try their case in Court, to time of its final determination. *Molen v. Denning & Clark Livestock Co.*, 56, 57, 50 P. 2nd 9-11.

The words "without prejudice", in an order, are not a bar to a trial on the merits of the case. *Owens v. Northern Industrial Chemical Co.*, 24 N. E. 2nd 1, 2, 304 Mass. 401, 26 A. C. R. 280; *Comm. ex rel. Eldredge v. Eldredge*, 104 A. 2d 185, 187; 175 Pa. Super. 276; *Wilkins v. Wilkins*, 213 P. 2d 752, 753, 95 Cal. App. 2d 611; *Fuimara v. American Surety Co. of N. Y.*, 31 A. 2nd 283, 287, 346 Pa. 584; *Morse v. Bragg*, 107 F. 2d 648, 649; *In re Bell*, 25 A. 2d 344, 350, 344 Pa. 223; *People ex rel. Waite v. Bristow*, 62 N. E. 2d 545, 550, 551, 391, 111, 101; *Ostler Land & Livestock Co. v. Brough*, 178 P. 2d 911, 913, 111 Utah 336.

The Sixth Amendment to the constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Petitioner maintains his rights to a fair trial under the Sixth Amendment and to due process and self-incrimination under the Fifth Amendment, as well as his rights under the Fourth Amendment, were violated by the Trial Judge's rulings and orders, in that, as well as others:

(1) Petitioner was restricted from testifying on his own behalf as to the fraud, deceit, trickery and misrepresentations by the Government agents (11a-59a).

(2) Petitioner was restricted from questioning the Government agents, either on cross examination or as his own witnesses, as to their alleged actions of fraud, deceit and trickery on the defendant (11a-59a).

(3) Petitioner was denied a directed judgment of acquittal on the grounds of fraud, deceit, trickery and misrepresentation, and mentioning same, as well as suppression of evidence before the jury. This at the end of the Government's case and at the end of the defendant's case (11a-59a).

Coplon v. United States, 191 F. 2d 760 (10).

(4) Petitioner was denied a charge to the jury on the said questions of fraud, deceit, trickery and misrepresentation (66a).

The petitioner failed to receive a fair, just and impartial trial.

III. Although the Court of Appeals in their opinions stated that Judge Gourley simultaneously entered an order dismissing the indictment, the record clearly shows that the new counsel's petition only concerned itself with a motion to suppress evidence and did not ask for reconsideration pertaining to the refusal to dismiss the indictment. It is interesting to note further that neither the petitioner nor the government pressed questions concerning the indictment but the matter was brought forth by Judge Gourley only for purposes of creating an avenue of appeal to the Government as in U. S. v. Janitz, 161 F. 2d 19 and United States v. Pack, 247 F. 2d 168. This conclusion is obvious when the record is reviewed. Judge Gourley's first opinion granted the Motion to Suppress and ignored the indictment. Thereafter the Government

appealed the decision to the Court of Appeals and subsequently withdrew the appeal after this Court filed its opinion in Carroll v. United States, 354 U. S. 394, holding that such a motion was interlocutory. The Government then requested a reargument, presented nothing new and then Judge Gourley filed his second opinion which was similar to the first but adding thereto a paragraph dismissing the indictment to enable the Government to appeal. There can be no question that the Court of Appeals had no statutory jurisdiction to consider the Government's appeal.

IV. Petitioner is in accord with the thinking of the Court of Appeals in that there can be a legal distinction between evidence to suppress and evidence that is presented to the Grand Jury and for that reason the new counsel's petition did not concern itself with the validity of the indictment. The reargument requested by new counsel for petitioner which was heard by Judge Gourley was limited to the Motion to Suppress. The Carroll case, *supra*, unequivocally sets forth the law that a Motion to Suppress is interlocutory.

The Court of Appeals however insists that it may properly review the motion where the indictment is dismissed. In every case where fraud and deceit are charged in a Motion to Suppress the Indictment may always be subject to dismissal. If, therefore, the appellate court may review a Motion to Suppress when the indictment is dismissed the law enunciated by the Carroll case is non-existent. The Court of Appeals for the Third Circuit had no jurisdiction in this case, at best, its jurisdiction was limited to reviewing the propriety of the dismissal of the indictment. It seems almost ludicrous to have the Supreme

Court rule that a Motion to Suppress is interlocutory and then permit the Court of Appeals to review such a motion on the excuse that the indictment was dismissed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

MAURICE A. WHEELER.

Criminal Action No. 14337.

MEMORANDUM OPINION AND ORDER.

Opinion

MILLER, District Judge.

Defendant was indicted for tax evasion with respect to his 1950 income tax return under Int. Rev. Code of 1939, § 145(b). The indictment was filed September 9, 1954. Defendant was arraigned and pleaded not guilty September 30, 1954. The case is before the court upon defendant's motion for bill of particulars, motion to suppress evidence and to dismiss indictment, and motion for return of books and records, the government's answers to defendant's motions, and defendant's reply affidavit to the government's answers.

At the argument upon the motions, counsel indicated that they would be able to agree upon defendant's motion for a bill of particulars. Therefore, that motion will be denied without prejudice.

Defendant's motion to suppress evidence and to dismiss avers, *inter alia*, that the indictment fails to state facts sufficient to constitute an offense against the United States and is barred by limitations. No basis for these contentions is apparent, and none has been suggested to the court. As to limitation, *see* Int. Rev. Code of 1939, § 3748, as amended, 68 A. Stat. 929 (1954) (now Int. Rev. Code of 1954, § 6531).

The remaining averments of defendant's motions relate to defendant's contentions with respect to the search and seizure and self incrimination clauses of the constitution, based upon the circumstances under which the government acquired defendant's records with respect to his 1950 income and the information educed from those records. On November 15, 1954, following the argument upon defendant's motions, the court ordered a hearing upon the factual issue raised by defendant's motions.

At the hearing thus ordered, testimony was taken of Byron Kreiger and Robert J. Madden, Internal Revenue agents, and Robert W. Corey, Chief of the Intelligence Division of the Internal Revenue Service for the Pittsburgh district. The following facts appear from the testimony.

Kreiger is an Internal Revenue Agent, regularly assigned to the audit division of the Detroit district director's office. His ordinary duties are confined to Michigan. In May 1953 he was assigned to Pittsburgh, being told only that there was need for a man familiar with corporate and net worth cases. The assignment came from the inspection service of the Internal Revenue Service in Washington. In Pittsburgh he reported to Ross Thompson, staff officer in the inspection service, whose regular post of duty was in Washington. Thompson assigned certain returns for Kreiger to examine. Kreiger became part of a team that was conduct-

ing a personnel investigation of the Pittsburgh office of the Internal Revenue Service, certain undisclosed irregularities in the Pittsburgh office having been alleged. The investigation ultimately resulted in a number of indictments. While in Pittsburgh, he examined, in addition to defendant's returns, one corporate case and one net worth case. He had not been instructed to look for evidence of criminal violations, but he was told to report any evidence of defendant's connection with certain individuals. The examination of defendant's return was related in an undisclosed way to the problem that Thompson was investigating in the Pittsburgh office.

On June 3, 1953, Kreiger telephoned defendant and told him that he was an Internal Revenue agent and that he had his income tax return for examination. No further information was then given to defendant. Kreiger spent several days in defendant's office with defendant's permission examining defendant's records. In so doing, he came across the names of certain individuals that he had been told to look out for. He reported this fact to Andrew Hankowski, who was one of the team conducting the personnel inspection in Pittsburgh. Hankowski was from the Intelligence unit of the Internal Revenue Service in Milwaukee and was also part of the inspection service there. The Intelligence service primarily conducts fraud investigations, which may result in civil or criminal penalties.

Kreiger, with defendant's permission, took part of defendant's records to the Pittsburgh Internal Revenue offices, giving him a receipt therefor, primarily because there was insufficient room to work on them in defendant's office. Kreiger kept defendant's records until August 3 or 4, 1953, at which time he turned them over to an agent named Hawthorne who was examining defendant's 1952 return. By

that time, Kreiger's investigation of defendant's 1950 and 1951 returns had become a joint investigation with the Intelligence unit in Pittsburgh, Kreiger having referred the case to Intelligence on finding items indicative of fraud. Those items are involved in the instant proceedings.

The joint investigation commenced on August 4, 1953, when Kreiger introduced agent Madden, from the Intelligence unit in Pittsburgh, to defendant. Defendant was then told for the first time that it was believed that certain fees had not been reported, that the case had criminal aspects, that his returns for 1950 and 1951 would continue to be investigated, and that the investigation would be expanded into 1949 and 1952. Defendant then freely offered his books and records for inspection to clear up the whole matter, although he was then told that anything obtained might be used in a criminal action against him. Of course, at that time, and continuing up to the present time, the records and evidence here involved were already in Madden's possession, the records having previously been obtained by Madden from Kreiger and by Kreiger from defendant.

As the authorities cited below indicate, no immunity is conferred by the failure of an Internal Revenue agent, in making a routine examination, to advise a taxpayer of his constitutional rights or to advise of what should be obvious, *i. e.*, that appropriate action will be taken if evidence of a crime is disclosed. The foregoing is especially sound as applied to the instant case, the taxpayer in question being an experienced attorney. On the other hand, the constitutional protection against unlawful searches and seizures extends to evidence obtained through fraud and deceit as well as to that obtained through the unlawful use of force. *Gouled v. United States*, 255 U. S. 298, 305-06 (1921).

In the instant case there has been no evidence of affirmative deceitful or fraudulent misrepresentations. On the

other hand, although Kreiger's procedure in examining defendant's return was routine, the fact that Kreiger, from the Detroit office, was making the examination, as part of the investigation growing out of alleged irregularities in the Pittsburgh Internal Revenue office, was certainly not routine.

Problems similar to those here raised have been considered in a number of recent cases: *Smith v. United States*, 348 U. S. 147, 150-51 (1954); *Turner v. United States*, 222 F. 2d 926 (4th Cir. May 23, 1955), petition for cert. filed 24 U. S. Law Week 3040 (June 20, 1955); *Vloutis v. United States*, 219 F. 2d 782, 787-88 (5th Cir. 1955); *United States v. Burdick*, 214 F. 2d 768, 773-74 (3d Cir. 1954), remanded 348 U. S. 905 (1955); *Chieftain Pontiac Corp. v. Julian*, 209 F. 2d 657, 659-60 (1st Cir. 1954); *Sasser v. United States*, 208 F. 2d 535, 539 (5th Cir. 1953); *Montgomery v. United States*, 203 F. 2d 887, 893 (5th Cir. 1953); *Hanson v. United State* 186 F. 2d 61, 64-66 (8th Cir. 1950); *Himmelfarb v. United States*, 175 F. 2d 924, 937-38, 939-40 (9th Cir.), cert. denied 338 U. S. 860 (1949); *United States v. Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955), modifying 119 F. Supp. 538 (1954); *United States v. Guerrina*, 126 F. Supp. 609 (E. D. Pa. 1955), modifying 112 F. Supp. 126 (1953); *United States v. American Stevedores, Inc.*, 16 F. R. D. 164, 170-71 (S. D. N. Y. 1954); *United States v. Manno*, 118 F. Supp. 511, 516 (N. D. Ill. 1954); *United States v. Lipshitz*, 117 F. Supp. 466 (E. D. N. Y. 1954); *United States v. Levy*, 99 F. Supp. 529, 534 (D. Conn. 1951).

After consideration of the facts above set forth, in the light of the foregoing authorities, the court is of the opinion that defendant's motions should be denied, without prejudice to defendant's right to object to the admission of evidence obtained from his records. Cf. *Smith v. United States, supra.* An appropriate order is entered.

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

MAURICE A. WHEELER.

No. 14337 Criminal.

WALLACE S. GOURLEY, Chief Judge:

The Indictment in this proceeding was returned on September 9, 1954. Defendant was arraigned and plead not guilty on September 30, 1954. On October 18, 1954, defendant filed a motion to suppress evidence and to dismiss the indictment, claiming, *inter alia*, that the evidence secured from the defendant upon which the indictment was premised was secured under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

A hearing was held before the Honorable John L. Miller, an associate member of this court, on December 9 and 10, 1954, in which there were called as witnesses Byron Krieger, Walter W. Corey and Robert J. Madden.

On the basis of the testimony presented at said hearing, Judge Miller filed an Opinion and Order on the 16th day of August, 1955, in which the motion to suppress the evidence and to dismiss the indictment was denied. A peti-

tion for reargument and reconsideration was filed on November 15, 1955, and after hearing by Judge Miller, defendant's petition for reargument and reconsideration was dismissed on May 1, 1956. Defendant appealed from said Order of Judge Miller on May 11, 1956, and on June 7, 1956 the United States Court of Appeals for the Third Circuit dismissed the appeal for lack of jurisdiction.

On August 27, 1956, defendant filed an additional petition for rehearing on the motion to suppress evidence, and due to the involvements of Judge Miller in a prolonged criminal trial and other matters unrelated to the instant proceeding, coupled with the additional fact that this member of the court was in charge of the criminal docket at the time of the filing of the petition for rehearing, after consultation with my associate, Judge Miller, and in order to expedite the administration of the issues raised, my associate requested and agreed that this member of the court would hear and consider the second petition for rehearing. In conformity thereto, an order was entered by Judge Miller assigning the matter to this member of the court.

On the 21st day of September, 1956, the court entered an order directing the parties to appear for the taking of additional testimony on the 26th day of November, 1956. On said date Maurice A. Wheeler, the defendant, was called to testify, the nature and extent of his testimony appearing in 156 pages which were filed of record on March 1, 1957.

It was specifically stated at the time of hearing on November 26, 1956, that this member of the court would not hear any matters that had been heard by Judge Miller or disposed of by him, but that the court would only proceed with new matter. Defendant Wheeler did not testify before Judge Miller for the reason that he claimed the protection of the Fifth Amendment.

At the completion of the testimony on November 26, 1956, due to the inability of the parties for divers reasons to proceed with further testimony, the court entered an order continuing the hearing until January 4, 1957. On said date the court stated that if the defendant was unable to proceed on January 4, 1957, the motion to suppress the evidence and to dismiss the indictment would be refused.

On January 4, 1957, defendant called as witnesses Ross Thompson, Andrew L. Hankowski, Gilbert Robertson and George H. Lemay, and recalled Byron Krieger. This record comprised 110 additional pages.

The hearings, therefore, held before this member of the court on the petition for reconsideration and rehearing of the orders entered by Judge Miller comprised 270 additional pages of testimony, none of which testimony was presented to or considered by Judge Miller. In addition thereto, defendant did not testify before Judge Miller nor were any of the witnesses, who appeared before this member of the court, examined before Judge Miller with the exception of Byron Krieger, and the matters about which Byron Krieger was examined before this member of the court were not considered or evaluated by Judge Miller.

At the time of hearing on November 26, 1956, it was stipulated that all of the testimony presented at the hearing before Judge Miller on December 9 and 10, 1954, would be incorporated as part of the record of the proceeding to be formulated before this member of the court in disposing of the petition for rehearing.

On the 20th day of March, 1957, the court entered an order granting the motion of the defendant to suppress the evidence. An appeal was taken to the United States Court of Appeals for the Third Circuit on April 5, 1957, and on

August 1, 1957, based on an agreement between the parties, the United States Court of Appeals dismissed the appeal.

On September 3, 1957, the United States of America filed a petition, without notice to defense counsel and without leave of court, in the office of the Clerk of Courts, which motion is entitled "Motion for Rehearing and Reconsideration", based on alleged inconsistencies on the part of this member of the court in overruling my associate, Judge Miller, on substantially the same set of facts and circumstances. That the conclusion reached by this member of the court was contrary to a decision of the United States Court of Appeals for the Third Circuit in the case of United States of America v. Joseph Frank, Appeal No. 12168, filed May 15, 1957.

The government's petition also adverted to this court's opinion filed in Petition of Marko Terzich on July 26, 1957, in which the court stated that in a multiple complement court each member of the court should follow the rulings of an associate member where the same set of facts and the same questions of law arise. In the Petition of Marko Terzich the same factual situation for all practical intents and purposes existed and the same legal question was presented as was disposed of in a similar case by an associate member of this court. I reaffirm my belief that in a multiple complement court where the same factual and legal questions are presented, it is the duty and requirement of the members of said court to follow the rules and orders of an associate member of the court. However, in the instant proceeding the same facts and circumstances were not presented to my associate, Judge Miller, as were considered by this member of the court, as is reflected by the following facts:

Maurice A. Wheeler, the defendant, did not testify before Judge Miller and none of the matters presented in the

hearings held before this member of the court on November 26, 1956 and January 4, 1957, were presented to or considered by my associate, Judge Miller.

The procedure followed by this member of the court was in accordance with the decision of the United States Court of Appeals for the Third Circuit in the case of TCF Film Corp., *et al.* v. Wallace S. Gourley and United Exhibitors, Inc., 3 Cir., 240 F. 2d 711.

Since Judge Miller was not available to hear the petition for rehearing and entered an order assigning the matter to this member of the court, the consideration which was given to the questions raised by this member of the court did not and could not under any circumstances be construed to be overruling or considering the disposition of matters as presented to Judge Miller.

I can find no basis in any way whatsoever to support the position of the government that the order entered by this court which suppressed the evidence, entered on March 20, 1957, to be an intrusion on any previous order entered by Judge Miller for the reason that the testimony presented to this member of the court was different and unrelated to matters not considered by Judge Miller. Furthermore, due to the inability to hear the matter and his written assignment to this member of the court, disposition was made of the petition for rehearing solely on the facts presented to this member of the court in addition to the record before Judge Miller which was stipulated by the parties to be made part of the record.

The additional reason for the rehearing motion filed by the government is the statement that the decision of the United States Court of Appeals for the Third Circuit in the case of United States of America v. Joseph Frank, filed May 15, 1957, governs and controls the disposition of the

matter before this member of the court and that the decision of this member of the court is contrary to the decision in the Frank case.

There is no question that the government has authority to examine books, papers and records of a taxpayer and that no taxpayer should be so naive as to conclude that an audit by a Revenue Agent is made for purely social purposes. I am furthermore in agreement with the rule of law that an Internal Revenue Agent is not required to warn a defendant taxpayer that the taxpayer does not have to give any information to the Internal Revenue Agent who is investigating his tax returns, and that any information secured might be used against him in a criminal proceeding. Every investigation made by an Internal Revenue Agent of a taxpayer's records is in a sense routine at its inception since the agent cannot foresee what liability, civil or criminal, will grow out of his investigation in any given case. However, the Frank case is readily distinguishable on its facts from the case at bar. In the Frank case the agents testified that the investigation made of Frank's tax returns was routine but they *denied that they ever told the taxpayer they were merely conducting an investigation to determine routine civil tax liability.*

In the instant case the evidence clearly establishes that at the time the investigation was made by various Internal Revenue Agents, the agents were told by their superior that they were to express to the defendant that they were making a routine tax investigation and that said statements were made as a pretext to accomplish the underlying purpose of the investigation, to wit, to determine if the defendant was implicated in criminal liability with any employees of the Internal Revenue Service, and that said investigation was made with the primary purpose of rendering the defendant and any person with whom he might

have been associated directly or indirectly in the Internal Revenue Service as a possible subject for criminal prosecution. In short, the evidence overwhelmingly shows without any reasonable doubt that the underlying purpose of investigating the defendant's tax records was to find evidence of criminal wrongdoing on the part of any employee of Internal Revenue Service and whether the defendant was implicated or involved in any such wrongdoing.

So, in actuality, a fraud was perpetrated on the defendant when he was told that the investigation was routine to determine his civil liability to the government when in truth and in fact the purpose of the investigation was to ferret out acts of wrongdoing of any employee of Internal Revenue Service and whether the defendant was implicated or involved therein, and if the defendant was so implicated or involved, he was to be included as a possible subject for criminal prosecution. The conclusion must, therefore, be reached that the decision in the Frank case has no relevancy nor does it apply in any degree to the facts as they exist in this proceeding.

At the time of the hearing held before this member of the court, counsel for the government or the defendant did not discuss or press the second count of the motion originally filed on October 18, 1954, which, *inter alia*, asked the court to dismiss the indictment for the reason that the means by which the evidence was procured were under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

There was no basis for my associate, Judge Miller, to dismiss the indictment in view of the conclusions which he reached on the motion to suppress evidence. However, in view of the conclusions reached by this member of the court, by Opinion and Order filed on March 20, 1957, it

becomes necessary to dispose of defendant's motion to dismiss the indictment. It is my judgment, for the reasons which have been set forth most exhaustively in the opinion filed on March 20, 1957, that the indictment should be dismissed for the reason that it was procured under circumstances constituting self-incrimination and in violation of defendant's constitutional rights. U. S. v. Wheeler, 149 F. Supp. 445.

The motion to dismiss the indictment falls within the provisions of Rule 12(b)(2) of the Federal Rules of Criminal Procedure.

> "FIRST: The evidence on which said indictment was procured was under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.
>
> SECOND: The indictment fails to state facts sufficient to constitute an offense against the United States of America.
>
> THIRD: The indictment is barred by the Statute of Limitations."

Assuming all facts in the indictment to be true and without consideration of the circumstances under which the evidence was secured, the indictment states a cause of action sustainable under law and is not barred by the statute of limitation, nor does it fail to state facts sufficient to constitute an offense against the United States of America. However, the reasons set forth in the first legal premise is sustainable in view of the finding of the court that the indictment was procured under circumstances constituting self-incrimination and in violation of defendant's unconstitutional rights.

An appropriate Order is entered.

Opinion of the Court

(Filed June 24, 1958)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,483

UNITED STATES OF AMERICA,

Appellant,

v.

MAURICE A. WHEELER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1958

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges:*

By McLAUGHLIN, *Circuit Judge.*

This case raises a number of weighty questions, the only one of which we will have to decide is whether there are sufficient reasons for sustaining the granting of a motion upon the second rehearing thereof by a second judge of a district court after a first judge of the same court had already twice denied it.

The defendant was indicted on September 9, 1954 for evading 1950 income taxes. On October 18, 1954 he filed

motions to suppress certain of the evidence which he alleged had been acquired illegally by the government and to dismiss the indictment because its return had been based on the presentation of that evidence to the grand jury.

The alleged illegality in the acquisition of the evidence was that defendant made his records available to investigating agents who were ostensibly conducting a routine examination when in fact the investigation was actually intended to obtain evidence for possible criminal prosecutions of others with whom defendant was suspected of being involved. At hearings on the motions December 9th and 10th, 1954 it developed that defendant had originally been suspected of having connections with some misfeasance by Internal Revenue Service employees. It is beyond question that attention first focused on defendant's tax returns because of this suspicion, so that when an audit was made it had the two-fold purpose of ascertaining whether the returns were correct and whether they would show involvement in the matter which was under special investigation. Evitlence on the latter point seems to have been sought primarily for the purpose of constructing a case against other suspects rather than against Wheeler. In any event the investigating agent revealed only the first of the two purposes to the defendant when he first approached him for the purpose of gaining access to defendant's records.

In fact the investigation developed nothing on the point of involvement, but it did turn up evidence which the authorities apparently considered warranted indictment for income tax evasion. The investigation thus concluded with exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud.

On these facts Judge Miller on August 17, 1955, denied the motion for suppression of the evidence and for dismissal of the indictment, without prejudice to defendant's right to object to the admission of the evidence at trial. On May 1, 1956, he entered an order denying defendant's petition for reargument and reconsideration of the motion. An appeal to this court was dismissed for want of jurisdiction.

On August 27, 1956, defendant's new counsel filed another petition for rehearing of the motion to suppress evidence. Hearing was held on the petition on November 26, 1956, and on January 4, 1957 before Judge Gourley. On February 21, 1957, an order was entered by Judge Miller assigning the disposition of the petition for rehearing to Judge Gourley *nunc pro tunc* September 21, 1956, with consent of Judge Gourley. It appears from the record that this was done that the matter might be speedily dispatched, as Judge Miller was involved in the trial of two lengthy cases and it would not be convenient for him to handle the petition.

On March 20, 1957, Judge Gourley granted the motion for suppression of the evidence. This order was not appealable. Carroll v. United States 354 U. S. 394 (1957). On September 3, 1957, the government petitioned for rehearing on the motion. The matter was heard on September 6, 1957, and denied on that date by Judge Gourley who simultaneously entered an order dismissing the indictment for having been returned as a result of presentation to the grand jury of the evidence ruled to have been illegally acquired. The government appealed to this court. We therefore reach the question for decision.

In TCF Film Corp. v. Gourley, 240 F. 2d 711 (3 Cir. 1957) this court sitting *en banc* and speaking through Judge

Maris reaffirmed for this circuit the rule "* * * that judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other."[1] The rule might be more fundamentally stated that judges should not, if possible, place themselves in a position whereby in rendering impartial judgment on a question they might be required to overrule the decision of a judge of the same court in the same case. Cf. Price v. Greenway, 167 F. 2d 196 (3 Cir. 1948).

In deciding the TCF case we refused to follow Dictograph Products Company v. Sonotone Corp., 230 F. 2d 131 (2 Cir. 1956) any further than to recognize that the rule was not absolute and all-embracing and that there are exceptional circumstances which will permit one judge of a district court to overrule a decision by another judge of the same court in the same case. In other words there are occasional situations in which a judge cannot avoid placing himself in a position which may require him to reconsider a point already earlier decided in the same case by another judge of the same court. The TCF case in fact presented that very situation. The crux of the matter, then, is not whether a second judge on reconsideration of a question can or should overrule the first judge but whether he may properly entertain the reconsideration at all.

We thus have implicitly recognized that the rule is one regulating the exercise of discretion in acting rather than one denying power to act at all. Because the TCF case was a mandamus proceeding begun before entry of final judgment on the merits we decided only that the second judge had properly exercised discretion in reconsidering

[1] See authorities cited in TCF Film Corp. v. Gourley *supra*, footnotes 1 and 2, p. 713.

the case. We did not pass on whether the result he reached, which was also a matter of discretion, in permitting the amendment of the complaint was an abuse.

The exceptional circumstances which Judge Gourley found to justify his acting in this case were that Judge Miller was "unavailable" and had assigned the case to him "* * * because of its pressing urgency," and that "* * * none of the matters presented in the hearings held before * * * [Judge Gourley] were presented to or considered by * * * Judge Miller."

TCF Film Corp. v. Gourley, *supra*, involved a situation where the judge who had first denied a motion to amend and supplement the complaint was unavailable to consider the petition for rehearing by reason of the termination of his temporary assignment to the district in which the case was pending. We pointed out that other exceptional circumstances of unavailability of the first judge would be if he had died or resigned; it was obvious in these situations that if the petition for reconsideration were to be heard at all, it would have to be by another judge.

This case does not present a situation in which the first judge is unavailable in the sense that it amounts to an exceptional circumstance permitting a second judge to take the matter on rehearing with the inherent accompanying possibility of overruling the first judge. Judge Miller was not even temporarily disabled, but was active in the handling of certain other time-consuming and, no doubt, wearing litigation. The briefs indicate that he in fact sat with Judge Gourley for part of the hearing in this matter. That it was not immediately convenient for him to consider the renewed motion did not make him unavailable.

The more than three years that this case had been pending at the time Judge Gourley took it illustrates that the

only "pressing urgency" involved was the commendable concern to speed the dispensation of justice by maintaining as nearly current dockets as possible. But that usually desirable policy must sometimes give way to weightier or more delicate elements in the dispensation of justice. Here the element of "orderly functioning of the judicial process"[2] supersedes that of speeding a case to conclusion.

As we have pointed out, the heart of the matter is whether a second judge may properly entertain the reconsideration at all. We have indicated that if the first judge is available the matter should again be presented to him. But it is not always possible at the outset to determine whether the identical matter is simply being presented over again for reconsideration, or whether more accurately the matter is being reopened and additional matter presented bearing on the same question of law once decided on what was so far available.[3] In that latter situation the question has not really been decided earlier and is posed for the first time; the second judge ought, therefore, be free to render a decision.

It is true that some different witnesses testified before Judge Gourley than were heard by Judge Miller, but from an attentive perusal of the transcripts we fail to perceive that the substance of their testimony bearing on the motions to suppress the evidence and dismiss the indictment was any different. Therefore, though it was a proper exercise of discretion to take the new testimony, the decision on what was substantially the same testimony was nothing more than a review of Judge Miller's earlier decision and

[2] The phrase is Judge Maris' in TCF Film Corp. v. Gourley, *supra*, p. 714.

[3] Permitting this latter situation to develop is again pretty much within the discretion of the judge to whom the matter is brought; such an exercise of discretion is largely untrammeled because the case is still malleable, not yet having gone to final judgment.

was an abuse of discretion. Such a review would under the circumstances have been an abuse even had the result been the same as Judge Miller's though the error would, of course, then have been harmless. And it would still under the circumstances have been an abuse of discretion even had the results reached by each judge on the merits been the opposite.

In this last conclusion at least we apparently are at odds with the Second Circuit in Dictograph Products Co. v. Sonotone Corp., *supra*. But if the second judge has as much chance of being in error on the merits as has the first judge in considering the same question, we fail to see why the fortuity (if it can be called that) of the second judge being right in the eyes of an appellate court should affect the operation of the rule designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented.

We are driven to the conclusion that the result in the Dictograph Products case was conditioned by the appellate court's conviction that the second judge had been right in dismissing the complaint whereas the first judge had been wrong in not doing so. The case really presents an argument favoring allowance of appeals from the denial of interlocutory orders which if granted would end the litigation, rather than requiring the case to wind through trial to final judgment and then upon review to find that the interlocutory order was in error and that the trial had been unnecessary.

Jurisdiction to entertain this appeal has so far been assumed, but defendant-appellee has pending a motion to dismiss the appeal for want of jurisdiction under 18 U. S. C.

§ 3731[4] on the authority of United States v. Pack, 247 F. 2d 168 (3 Cir. 1957) and United States v. Janitz, 161 F. 2d 19 (3 Cir. 1947). The pertinent statute at the time Janitz was decided was 56 Stat. 271 (1942), 18 U. S. C. § 682 (1946).[5] The Pack opinion held, after an exhaustive review of the legislative history, that the difference in wording of the revised § 3731 had not been intended to work any change from the substantive meaning of § 682.

In both Pack and Janitz the trial courts had entered orders suppressing certain evidence without which as a practical matter the government found itself unable to conduct an effective prosecution; the trial courts in both instances, frankly seeking to provide review for their suppression orders and ostensibly acting under Rule 48(b), Fed. Rules of Criminal Procedure, subsequently entered dismissals of the indictments. In Janitz, at page 21, this court said:

> "We think it is clear * * * that the learned Judge's order of dismissal was not based on any objection brought against the indictment at all. The defendants had made no attack on the indictment. The Government's case failed because it had no testimony to support it. We think this is not the kind of a judgment to which the Criminal Appeals statute is directed."

[4] 18 U. S. C. § 3731 (1952):

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

[5] 56 Stat. 271 (1942), 18 U. S. C. § 682 (1946):

"An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act."

The Pack opinion determined that the revised statute called for the same result in that case.

What we have here, however, is an appeal on behalf of the United States from a quashing and setting aside of an indictment, thought by the dismissing judge to have been illegally obtained. The dismissal was entered explicitly under Rule 12(b)(2), Fed. Rules Crim. Procedure and not solely because of the government's failure or inability to prosecute. Nor was the dismissal, as appellees allege, simply a well-conceived device for putting before this court for review the interlocutory order suppressing the evidence. Consideration by us of whether an indictment is defective if obtained as a result of presentation to the grand jury of evidence unlawfully acquired by the government would not necessarily have also entailed consideration of the different question of whether the evidence involved was subject to a suppression order. And were we to consider both questions, reinstatement of the indictment would not necessarily compel a reversal of the suppression order. Jurisdiction for this appeal, therefore, is conferred by 18 U. S. C. § 3731.

The motion to dismiss the appeal is denied. The order of March 20, 1957 granting the defendant's motion to suppress evidence, and the order of September 6, 1957 granting the motion to dismiss the indictment are vacated and the cause is remanded for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Opinion and Order

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAURICE A. WHEELER,

Defendant.

Criminal No. 14337.

OPINION

Marsh, District Judge.

The defendant, an attorney at law, was convicted under a one-count indictment charging him with income tax evasion in violation of § 145(b) of the Internal Revenue Code of 1939. He moves for a new trial on the following grounds:

(1) The verdict is against the weight of the evidence and was not supported by the evidence.

On the merits, the evidence was overwhelming, and not denied, that defendant failed to report substantial taxable income for the year 1950. The only defense advanced on the merits was that he did not knowingly and willfully intend to evade the tax. On abundant evidence, the jury found that the defendant willfully filed a false and fraudulent return for that year.

(2) The court erred (a) in refusing defendant the right to introduce evidence that the government obtained defendant's books and records by fraud, trickery and deceit; (b) in refusing to charge the jury on that issue; and (c) in failing to suppress the evidence for the reason that such was obtained by fraud, trickery and deceit.

These grounds present precedural problems under Rule 41(e) Fed. R. Crim. P., and therefore a brief review of the background is in order.

After indictment, defendant moved, pursuant to Rule 41(e), to surpress the evidence obtained by the government for its examination of his books, records and files, on the grounds that his rights under the Fifth Amendment of the United States Constitution were violated.[1] There exists some doubt that a motion to suppress evidence pursuant to Rule 41(e) may properly include questions involving the Fifth Amendment. *Biggs v. United States*, 246 F. 2d 40 (6th Cir. 1957), but compare *In re Fried*, 161 F. 2d 453 (2d Cir. 1947), which involved a preindictment motion. Nonetheless, Judge Miller, as associate of this court, denied the motion holding that defendant's rights had not been violated under either the Fourth or Fifth Amendment.[2]

At the trial, before testimony was given, defendant renewed his motion to suppress the evidence as being obtained in violation of the Fourth and Fifth Amendments. On objection, this motion was denied. We think the ruling was proper for three reasons.

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[1] Defendant's original petition to suppress evidence seems to rely solely on a violation of the Fifth Amendment, but his petition for rehearing filed August 27, 1956 shows that in reality he was urging suppression for violation of both the Fourth and Fifth Amendments.

[2] See unpublished Memorandum Opinion and Order, Criminal Action 14337, Miller, D. J. For the history of the pretracted pretrial proceedings, see Wheeler v. United States, 256 F. 2d 745 (3d Cir. 1958).

First, because Rule 41(e) commands that the motion "*shall be made before trial*" unless opportunity did not exist or defendant was not aware of the grounds. *United States v. Sheba Bracelets*, 248 F. 2d 134, 139-143 (2d Cir. 1957).[3] The defendant had presented a timely motion and lost after extensive litigation. Thus he was barred from litigating it again on the same evidence at the trial. Judge Miller's decision became the law or controlling rule of the case. *Waldron v. United States*, 219 F. 2d 37 (D. C. Cir. 1955); *United States v. Jennings*, 19 F. R. D. 311 (D. D. C. 1956), aff'd 247 F. 2d 784 (D. C. Cir. 1957). In *Jennings*, at page 312, Judge Holtseff said:

> "[T]he Rule does not permit the Court to rehear or review the master if a motion had been properly made and disposed of. There is sound reason for this procedure. Its purpose is to prevent the trial on the merits from being diverted to a consideration of tangential issues that can be properly isolated and determined in advance in the interest of efficiency."

In *Waldron*, at page 41, Judge Prettman aptly stated:

> "The basic purpose of the rule is to prevent, so far as possible, the delay and attendant confusion resulting from attacks during a trial on the admissibility of illegally seized evidence. • • • Once the court has dispersed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly."

To the same affect, see *Nardone v. United States*, 308 U. S. 338, at pages 341-342 (1939), and *Weeks v. United States*, 232 U. S. 383, 395-6 (1914).

It is unlikely that the Rule would have required a hearing before trial if it were contemplated that the same facts should be presented again to the trial judge, or to a jury. In view of current court congestion such time-con-

[3] In Weeks v. United States, 232 U. S. 383, 395-6 (1914), similar practice was required prior to the enactment of Rule 41(e).

suming procedure is to be avoided if consistent with due process.[4]

Second, in the absence of new evidence, and none was offered, a judge should not place himself in a position whereby he might be required to overrule the decision of a judge of the same court in the same case. *United States v. Wheeler*, 256 F. 2d 745 (3d Cir. 1958); *T. C. F. Film Corp. v. Gourley*, 240 F. 2d 711 (3d Cir. 1957).

Third, we apprehend that a post-indictment ruling under Rule 41(e) is an interlocutory order in the course of a criminal proceeding pending before the court, which, if erroneous and a conviction ensues, would result in a new trial at the hands of the appellate court, even though no objection were made at the trial. *Waldron v. United States*, 219 F. 2d 37, 41 (D. C. Cir. 1955). Until that eventuality, the interlocutory order of Judge Miller stands as the law of the case which is binding on the trial judge. Defendant emphasizes that Judge Miller's order stated that defendant's motion was denied "without prejudice to defendant's right to object to the admission of evidence". At the threshold of the trial, the defendant did object to each and every government witness and to the admissibility of the government's evidence, and moved the trial judge to suppress that evidence at least twice; therefore, his rights have been fully preserved for appellate review. Cf. *Draper v. United States*, 358 U. S. 307 (1959).

Next, defendant moved that the record made at the pretrial hearings be made part of the testimony of the trial. This motion was also denied. Thereafter, through-

[4] Under some circumstances, such as new evidence of which defendant was not aware at the time of the preliminary hearing, it may be necessary to entertain again the motion to suppress, Gouled v. United States, 255 U. S. 298 (1921); or submit *conflicting* evidence to a jury with respect to an admission allegedly obtained by fraud, Smith v. United States, 348 U. S. 147 (1954).

out the trial, defendant persistently endeavored to relitigate the Constitutional questions in order that *the jury* might decide that which had already been decided by Judge Miller. In response to repeated inquiries, the defendant advised that he had no additional or new evidence which had not been adduced at the pretrial hearings. Therefore, the court refused to permit introduction of testimony relating to the Constitutional questions or to permit the issues litigated and decided by Judge Miller to be submitted to the jury for decision.

Defendant vigorously argues that the Constitutional issues should have been submitted to the jury. He points to Judge Miller's without prejudice order and cites *United States v. Frank*, 245 F. 2d 284 (3d Cir. 1957), where the issues of trickery, fraud, and deceit were submitted to the jury. In that case, however, after the denial of a motion to suppress under Rule 41(e), *additional evidence* was developed at the trial before the *same* judge who had previously denied the motion.

We think it is well established that questions decided under Rule 41(e), particularly those relating to the competency of evidence obtained by alleged illegal search and seizure in violation of the Fourth Amendment, are legal questions for the court and are not for the jury. Universally the competency of evidence is a question of law for the court and not for a jury.

In *Steele v. United States No. 2*, 267 U. S. 505, 511 (1925), it was held that the question of competency of the evidence, by reason of the legality or otherwise of its seizure, was a question of fact and law for the court and not for the jury.

In *Burris v. United States*, 192 F. 2d 253, 254-255 (5th Cir. 1951) it was held that issues to suppress under the

Fourth Amendment are for the trial judge. The court stated:

> "It was therefore entirely proper that the court prohibit cross examination of the witnesses upon this question when before the jury, and likewise refuse to permit argument to the jury by counsel upon this question."

The government argued to the contrary in *United States v. Guerring*, 126 F. Supp. 609, 611 (E. D. Pa. 1955), but the district judge concluded:

> "[T]hat the question of suppression of evidence because of illegality of search and seizure is one for determination by the Court *and not by a jury.*" (Emphasis supplied.)[5]

What has already been said might very well apply to the question whether or not the evidence was obtained in violation of the Fifth Amendment since defendant sought and received a decision on his rights in that respect under Rule 41(e). Compare *Boyd v. United States*, 116 U. S. 616. As previously stated the defendant made this the primary issue for decision in his motion to suppress; it was decided against him by Judge Miller whose interlocutory order became the law of the case.

At the trial, defendant was permitted to cross examine the government agents concerning everything they did and said to him when they requested permission to examine his records; and defendant was permitted to testify as to what those agents did and said. This testimony shows a complete absence of coercion, pressure or compulsion on the part of the agents. Indeed, the defendant testified that

[5] For other cases so holding, see Ford v. United States, 273 U. S. 593, 605 (1927); Batten v. United States, 188 F. 2d 75, 77 (5th Cir. 1951); Roberson v. United States, 165 F. 2d 752, 754 (6th Cir. 1948); United States v. Lustig, 163 F. 2d 85, 68 (2d Cir. 1947); United States v. Adelman, 107 F. 2d 497 (2d Cir. 1939); United States v. Bianco, 96 F. 2d 97, 98 (2d Cir. 1938); Vollmer v. United States, 2 F. 2d 551, 552 (5th Cir. 1924).

he voluntarily produced all his records upon request and fully cooperated with the agents.[6] Likewise, there was no evidence of any false statements, or of any affirmative deceitful or fraudulent misrepresentations; there was no promise of immunity. Therefore, since no factual disputes were developed on the issues of voluntariness, trickery, fraud or deceit, there was nothing for the jury to decide with reference to the Fifth Amendment. *Williams v. United States*, 189 F. 2d 693 (D. C. Cir. 1951); *Smith v. United States*, 210 F. 2d 496, 498 (1st Cir. 1954), aff'd 348 U. S. 147 (1954).

Defendant relies on *Smith v. United States, supra*, 348 U. S. at 150-151, for the proposition that under the Fifth Amendment the question whether or not defendant was induced to incriminate himself by fraud, trickery or deceit is one of fact for the jury. But in that case on those issues conflicting testimony was given at the trial. There the defendant and his accountant testified that they had submitted a net worth statement to the agent in consequence of an *affirmative misrepresentation and promise of immunity. The agent denied the misrepresentation and the promise.* Thus there arose an issue of fact for the jury whether or not the net worth statement had been obtained by trickery, fraud or deceit practiced on defendant and his accountant. There was no disputed issue of fact in the case at bar such as existed in the *Smith* case.[7]

At the trial it was elicited from Revenue Agent Kreiger that he was a part of a special team of the Inspection Service whose primary duty was to investigate alleged

[6] Defendant's books and records were returned to him before trial.

[7] Defendant admitted this distinction in his Petition for Reargument, page 7 *et seq.*, filed November 15, 1955. On page 6 he stated: "In the case at bar since there is no conflicting evidence, the question of admissibility is one of law for the Court and not a fact for the Jury." He was not then represented by present counsel.

misconduct of certain Internal Revenue employees; that Kreiger's particular duty was to audit certain tax returns, including those of the defendant, and to be alert for certain names in defendant's records. It was also shown or proffered that the suspected misfeasance of Revenue employees motivated the investigation of defendant's records; and that Kreiger failed to apprise or warn defendant that this investigation, in addition to auditing his tax returns, was also to ascertain whether his records would reveal the names of the suspected employees.

Defendant contends that this failure to disclose these facts to him prior to his voluntary production of his 1950 records was evidence on which the jury could find that he was induced to incriminate himself by trickery, fraud and deceit in violation of his rights under the Fifth Amendment.

It was on substantially the same evidence, albeit amplified, that Judge Miller decided as a matter of law that defendant's rights under the Fifth Amendment, as well as the Fourth Amendment, had not been violated and refused to suppress the government's evidence. If the pretrial ruling was wrong as a matter of law, the evidence should be suppressed and a new trial granted. But since it was unequivocally established that Kreiger did not reveal to defendant the primary purpose of the inspectoral team or its suspicions that defendant may have been involved with employee misfeasance, there was nothing on that score for the jury to decide.

Finally, defendant seems to contend in his brief, citing *Biggs v. United States, supra,* and *Jennings v. United States,* 247 F. 2d 784 (D. C. Cir. 1957), that questions relating to the Fifth Amendment—specifically to the sup-

pression of evidence procured from confessions or admissions—should not be decided in motions to suppress under Rule 41(e), but should be dealt with "at the trial by the tribunal before which they were sought to be introduced". He contends that this is what Judge Miller intended. It seems to us that this argument completely overlooks the fact that it was defendant who, pursuant to Rule 41(e), requested and received a preliminary decision[8] on the competency of the evidence procured from his records and this must abide by that ruling in the absence of new evidence.

However, assuming the defendant's final contention is correct, we think there was no issue of fact for the jury to decide, and the trial judge was bound by the pretrial ruling of Judge Miller that the government's evidence was competent. *United States v. Wheeler, supra.*

It is established that failure to warn a person suspected of crime of his Constitutional rights does not of itself make his confession or admissions involuntary, *Wilson v. United States*, 162 U. S. 613, 623 (1896); *Powers v. United States*, 223 U. S. 303, 313 (1912). And it seems to be pretty well settled that if a taxpayer freely consents to a tax examination of his records at the request of an internal revenue agent,[8] as was done in this case, it is not to be concluded that his consent was enticed, induced, or rendered involuntary by the failure of the agent to divulge the purpose and instructions of his superiors or to warn the taxpayer that he is under suspicion of criminality.[9] *Turner v. Unit-*

[8] The government has statutory authority to examine the records of a taxpayer. Internal Revenue Code of 1939, § 3614, 26 U. S. C. A. § 3614, re-enacted in the 1954 Code, § 7602, 26 U. S. C. A. § 7602.

[9] In United States v. Frank, *supra*, at p. 286, it was stated:
"[W]e do not think any taxpayer considers an audit by a revenue agent to be a call for purely social purposes."
This observation would be particularly pertinent to an attorney at law.

ed States, 222 F. 2d 926 (4th Cir. 1955), a case involving both the Fourth and Fifth Amendments. See also, *United States v. Achilli*, 234 F. 2d 797 (7th Cir. 1956), *aff'd* 353 U. S. 373 (1957); *Vloutis v. United States*, 219 F. 2d 782 (5th Cir. 1955); *United States v. Burdick*, 214 F. 2d 768 (3d Cir. 1954); *Montgomery v. United States*, 203 F. 2d 887 (5th Cir. 1953), where the agent made affirmative representations that the investigation was "purely a civil matter."[10] In none of these cases does it appear that issues of trickery, fraud or deceit were submitted to the jury.

Hence, we think defendant's rights under the Fifth Amendment were not violated, and it was not error at the trial to refuse to suppress the government's evidence or submit the Constitutional issues under the Fifth Amendment to the jury. The motion for a new trial will be denied.

ORDER OF COURT

And Now, to-wit, this 2nd day of April, 1959, after argument and upon due consideration of the briefs, It Is Ordered that defendant's motion for a new trial be and the same hereby is denied. The United States Attorney is directed to produce the defendant for sentencing on Monday, April 13, 1959, at 10:00 A. M.

(signed) RABE F. MARSH,
United States District Judge.

[10] *Contra:* United States v. Wheeler, 149 F. Supp. 445 (W. D. Pa. 1957), and the authorities cited therein.

Opinion of the Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,925

UNITED STATES OF AMERICA,
Appellee,

v.

MAURICE A. WHEELER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 4, 1959
Before McLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

(Filed March 2, 1960)

By McLAUGHLIN, *Circuit Judge.*

The docket in this appeal goes back to September 9, 1954, when appellant was indicted for income tax evasion in connection with his 1950 income tax return. Thereafter, *inter alia*, the defense moved to suppress evidence and dismiss the indictment. A hearing was allowed on the factual issue raised. The evidence showed that defendant had been suspected of involvement in some wrongful conduct by revenue employees. This was what had initially directed at-

tention to defendant's tax returns. As a result an audit of them was made as to their correctness and whether they were connected with the department problem under scrutiny. Evidence regarding the latter seems to have been sought against the others suspected rather than Wheeler. The investigating agent only told Wheeler of the first objective when he sought access to Wheeler's records.

The investigation disclosed indictable evidence against Wheeler for income tax evasion but nothing *re* his supposed connection with reprehensible conduct of revenue agents. The motion to suppress was denied without prejudice to defendant's right to object to the evidence at the trial. Later a petition for reargument and reconsideration was denied. The defendant's appeal on this was dismissed for lack of jurisdiction.

On August 27, 1956 a second petition for rehearing of the motion was filed. This was heard by another judge who granted the motion. The government's petition for rehearing was denied and coupled with this, the new judge in the case dismissed the indictment on the ground that it had been obtained by presenting to the grand jury evidence ruled to have been illegally acquired. On appeal we reversed that decision holding that since it was based on substantially the same testimony as had been considered by the first judge, though there were some different witnesses, it was nothing more than a review of the earlier decision and an abuse of discretion.[1]

Following the return of the case to the district court, appellant was tried to a jury under the one count indictment charging him with income tax evasion and convicted.

[1] United States v. Wheeler, 256 F. 2d 745 (3 Cir. 1958), cert. denied, 358 U. S. 873, rehearing denied, 358 U. S. 913.

On the motion for a new trial, the first point argued was that "The verdict is against the weight of the evidence." As to this Judge Marsh said:

> "On the merits, the evidence was overwhelming, and not denied, that defendant failed to report substantial taxable income for the year 1950. The only defense advanced on the merits was that he did not knowingly and willfully intend to evade the tax. On abundant evidence, the jury found that the defendant willfully filed a false and fraudulent return for that year."

Appellant here asserts that there was error in the denial of his petition to suppress evidence and his trial motion to the same effect. He charges fraud and deceit were practiced upon the defendant by the government agents in obtaining his books and records from him to assist them in a criminal investigation; he claims he did not voluntarily turn over his books and records to the government agents nor voluntarily consent to their use against him; he contends that his constitutional rights under the Fourth and Fifth Amendments were violated by the said agents.

What appellant is endeavoring to do is to relitigate his motion to suppress the evidence obtained by the government from its examination of his books, records and files. The original motion, in accordance with the mandate of Rule 41(e) R. F. C. P., was made before trial. It was properly passed upon by the trial court and denied. That ruling was affirmed by us in 256 F. 2d 745. At the trial it was urged again on the same evidence and was rightfully denied. Nardone v. United States, 308 U. S. 338, 341-342. (1939); Waldron v. United States, 219 F. 2d 37 (D. C. Cir. 1955); United States v. Jennings, 19 F. R. D. 311 (D. C. D. C. 1956), affd. 247 F. 2d 784 (D. C. Cir. 1957).

The contentions that fraud and deceit were practiced by the government agents in obtaining the evidence involved are disposed of completely by the district court's finding (with justification in the record) that:

> "At the trial, defendant was permitted to cross-examine the Government agents concerning everything they did and said to him when they requested permission to examine his records; and defendant was permitted to testify as to what those agents did and said. This testimony shows a complete absence of coercion, pressure or compulsion on the part of the agents. Indeed, the defendant testified that he voluntarily produced all his records upon request and fully cooperated with the agents. Likewise, there was no evidence of any false statements, or of any affirmative deceitful or fraudulent misrepresentations; there was no promise of immunity."

The trial transcript reveals plainly that appellant knew from his first telephone talk with Agent Krieger that his 1950 and 1951 tax returns were being investigated and that he willingly arranged with Kreiger for the latter to come to his office about these and to have his pertinent books and records available for Kreiger.[2] Later Kreiger with another agent, Madden, called on appellant at his office. According to appellant, Madden said: "* * * *there was a suspicion in their mind of fraud* and that they would like to have my records for 1949 and 1952. I (appellant) had no '49 records, and the '52 records which consisted of my cash book and my check stubs I turned over to Mr. Madden and to Mr. Kreiger." (Emphasis supplied). On re-cross-examination appellant was asked: "These records which you *voluntarily* turned over to Agents Krieger and

[2] Appellant testified that:

"Mr. Kreiger had called me on the telephone and said that he was from the Internal Revenue Service, had my '50 and '51 returns, and would like to come over to my office and see me about them and to have whatever books and records I had on those available for him. I said that would be fine."

Madden are the same records, I take it, that you had access to when you prepared your 1950 income tax return, were they not?" (Emphasis supplied). Appellant answered, "Yes, sir."

Under the guise of violation of his rights under the Fourth Amendment, appellant would, without any additional or new evidence which had not been produced at the pretrial hearings, have the evidence developed by the government from appellant's records passed on by the jury with reference to its competency. Having in mind that this precise question had already been decided by Judge Miller, that the described method before Judge Miller of the government in obtaining that evidence was substantially the same as was testified to at the pretrial hearing before the second judge, the question was one of fact and law for the court. Steele v. United States, 267 U. S. 505, 511 (1925); Burris v. United States, 192 F. 2d 253, 254-255 (5 Cir. 1951). In United States v. Frank, 245 F. 2d 284 (3 Cir. 1957), relied upon by appellant, there was additional evidence presented at the trial to the same judge who had denied the pretrial motion to suppress.

The thesis urged under the Fifth Amendment is much the same *i.e.* appellant was induced to incriminate himself through fraud and deceit. And the record simply does not in any way support that.

Appellant's sole reliance is placed on the proposition that at the time the government request was made regarding a conference with him on his 1950, 1951 income tax returns and to examine his records, the agent did not tell him that the department suspected him of wrongful dealings with internal revenue personnel. He himself actually did testify as above noted that in connection with the checkup, he was told by Agent Madden that fraud was suspected, at

which time he was asked for more of his tax returns. And he did agree under oath at the trial that he had voluntarily turned over his records to the government agents for investigation by them.

Appellant's contention is completely without merit. As we said in our opinion in 256 F. 2d 745 (1958) at page 746:

> "In fact the investigation developed nothing on the point of involvement, but it did turn up evidence which the authorities apparently considered warranted indictment for income tax evasion. The investigation thus concluded with exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud."

Smith v. United States, 348 U. S. 147, 151 (1954), is urged as in line with appellant's theory. That opinion is inapplicable. Its facts are entirely different; and it is based upon conflicting evidence which is not the situation presented by the record before us.

The important relevant inquiry in this case is whether appellant freely gave his consent to have his records examined with the knowledge that his returns were being investigated. The answer to that inquiry is unequivocally, yes.

Appellant's trial was meticulously fair. There is no error of any substance in the record. He was convicted on what a most experienced trial judge characterizes as "abundant evidence".

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order and Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,925

UNITED STATES OF AMERICA,
vs.
MAURICE A. WHEELER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

March 2, 1960

Received & Filed
Mar. 2, 1960
Ida O. Creskoff,
Clerk.